

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

THOMAS BRANDENBURG, *et al.*,

Plaintiffs,

Case No. 3:16-cv-516

vs.

COUSIN VINNY'S PIZZA, *et al.*,

Defendants.

District Judge Walter H. Rice
Magistrate Judge Michael J. Newman

**REPORT AND RECOMMENDATION¹ THAT THE PARTIES AGREED ORDER ON
PLAINTIFFS' MOTION FOR CONTEMPT BE GRANTED**

This civil case is before the Court on Plaintiffs' motion for contempt. Doc. 34. Defendants filed a memorandum in opposition to Plaintiffs' motion (doc. 44) and, thereafter, Plaintiffs filed a reply (doc. 49). On August 7, 2017, the Court held a hearing on Plaintiffs' motion. *See* docs. 50, 53. Subsequent to the Court's hearing on Plaintiffs' motion, the parties conferred and have worked collaboratively, in good faith, to address the discovery concerns presented in Plaintiffs' motion for contempt. The work of counsel in this regard should be applauded and demonstrates the professionalism and civility the Court expects of litigants and attorneys practicing before the Court. In an effort to resolve the outstanding issues presented in Plaintiffs' motion, the parties have conferred and negotiated terms of a proposed order for the Court's consideration (*see* Exhibit A, attached). The undersigned has carefully reviewed the parties' proposed agreed Order and **RECOMMENDS** that it be adopted.

Date: October 24, 2017

s/ Michael J. Newman
Michael J. Newman
United States Magistrate Judge

¹ Attached hereto is a NOTICE to the parties regarding objections to this Report and Recommendation. In an effort to expedite consideration of this Report and Recommendation, the parties may file a notice of no objection to the recommendation set forth herein.

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within **FOURTEEN** days after being served with this Report and Recommendation. This period is not extended by virtue of Fed. R. Civ. P. 6(d) if served on you by electronic means, such as via the Court's CM/ECF filing system. If, however, this Report and Recommendation was served upon you by mail, this deadline is extended to **SEVENTEEN DAYS** by application of Fed. R. Civ. P. 6(d). Parties may seek an extension of the deadline to file objections by filing a motion for extension, which the Court may grant upon a showing of good cause.

Any objections filed shall specify the portions of the Report and Recommendation objected to, and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based, in whole or in part, upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs.

A party may respond to another party's objections within **FOURTEEN** days after being served with a copy thereof. As noted above, this period is not extended by virtue of Fed. R. Civ. P. 6(d) if served on you by electronic means, such as via the Court's CM/ECF filing system. If, however, this Report and Recommendation was served upon you by mail, this deadline is extended to **SEVENTEEN DAYS** by application of Fed. R. Civ. P. 6(d).

Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140, 153-55 (1985); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981).

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Thomas Brandenburg, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	Case No. 3:16-cv-516
	:	
vs.	:	Judge Walter H. Rice
	:	
Cousin Vinny's Pizza, LLC, <i>et al.</i> ,	:	Magistrate Judge Michael J. Newman
	:	
Defendants.	:	

AGREED ORDER ON PLAINTIFFS' MOTION FOR CONTEMPT

This matter came before the Court on Plaintiffs' Motion for Contempt (Doc. 34) (the "Motion"). In an effort to discover the facts concerning the destruction of mileage-related data in Defendants' possession and in the hope that discovering such facts will help to resolve or obviate the need for resolving issues raised in the Motion, the parties have submitted this Agreed Order to the Court. For good cause shown, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion be resolved as follows by agreement of the parties:

1. The forensic IT firm hired by Defendants, Binary Intelligence, shall cease work immediately.
2. Within 7 days of the date of this Agreed Order, Plaintiffs and Defendants will jointly select and retain a new forensic IT/computer expert ("expert") to address the computer-related issues raised in Plaintiffs' Motion and related briefing. In the event that the parties are unable to agree on an expert, the parties shall present their choices to the Court, and the Court will select an expert. The Court may select one of the parties' choices or any other qualified expert.
3. The Court will supervise future discovery into the missing mileage-related data.

4. All communications between any party (or party's counsel) and the expert shall take place jointly with counsel for Plaintiffs and Defendants present or copied (*i.e.*, no *ex-parte* communications), and to the extent such communications are in writing, the Court shall be copied thereon.
5. To the extent the expert believes it necessary, Defendants will permit the expert to enter their facilities in order to image and/or clone the computers and other machines that may contain delivery-related data at each of Defendants' store locations and from any Cousin Vinny's office or headquarters. These site visits will be completed outside Cousin Vinny's regular business hours and/or overnight over a series of nights, if necessary.
6. To the extent the expert believes it necessary, Defendants will provide the expert with complete access to the computers and/or other machines that may contain delivery-related data, all necessary computers, servers, hard drives, and other sources and/or repositories of data from each of its store locations and from any Cousin Vinny's office or headquarters to the expert.
7. The expert's work will be focused on the following: (1) determining the causes, circumstances, and time line related to the data deletion or destruction referenced in Plaintiffs' Motion and the related filings; (2) retrieving all data relating to deliveries completed at the each of the stores from December 23, 2013 through July 2016; (3) providing a report to the Court, and to the parties (a) stating whether the data was recoverable and, if not, why not, (b) identifying which data could be recovered and which could not, and (c) identifying the timing and causes, to the extent discernible, of any deletion or destruction of data and, in so doing, distinguishing the deleted or destroyed data that was recoverable from that which was not recoverable. The expert shall not disclose to Plaintiffs any Cousin Vinny's information not relating to payroll, employee compensation, mileage, the hack of Cousin Vinny's computer systems, the data reset of Cousin Vinny's computer systems, or other topics pertaining to Plaintiffs' claims of minimum wage violations or any other source of data loss.
8. Defendants shall pay for the services provided by the expert and all other costs and expenses related thereto.
9. The Court will decide whether attorney fees are appropriate, and if so the amount of attorney fees and costs to be awarded to Plaintiffs in connection with the matters addressed in Plaintiffs' Motion and the related filings. Within 14 days of this Order, Plaintiffs may file a motion in support of a fee award. Defendants will have 14 days to respond to that motion, and Plaintiffs will have 7 days to file a reply.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

Agreed:

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